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In The Supreme Court of the United States
OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS INC.,
Petitioner,

v.

CHARLES T. VON DER AHE and CHROMA LIGHTING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE AMERICAN PETROLEUM INSTITUTE SUPPORTING PETITIONER

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30 pp

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Petroleum Institute (API) hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for respondent was requested but refused.

The interest of API in this cases arises from the fact that many of API's member companies are engaged in nationwide marketing and distribution activities. Accordingly, API's members have a vital interest in the correct perception of the Robinson-Patman Act within the overall federal antitrust landscape. This interest is reflected in the participation of many of API's individual members in Robinson-Patman Act cases in this Court for many decades. *E.g., Standard Oil Co. v. FTC*, 340 U.S. 231 (1951); *Perkins v. Standard Oil Co.*, 395

U.S. 642 (1969); *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990). Given such past litigation of Robinson-Patman Act issues in the petroleum industry, API believes that its participation as amicus curiae can provide the Court with a fuller perspective of the historical interaction among the Robinson-Patman Act, the Clayton Act and the Sherman Act. Moreover, the attached amicus brief discusses more fully than the petition this Court's long-standing vigilance in granting certiorari to correct overly expansive readings of the Robinson-Patman Act that might adversely affect competition. Because API's members include firms that market products nationwide and face the patchwork quilt of conflicting circuit court decisions on the issue presented in this case, API believes that it can add to the Court's understanding of the practical factors that strongly favor review.

Accordingly, API requests that the Court grant leave to file the attached amicus curiae brief.

Respectfully submitted.

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QUESTION PRESENTED

Whether, under the Clayton Act, as amended by the Robinson-Patman Act, injury to competition in a secondary-line price discrimination case is irrebuttably established by proof of injury to a competitor.

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

INTEREST OF AMICUS CURIAE.....1

INTRODUCTION AND STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE PETITION.....6

CONCLUSION.....20

TABLE OF AUTHORITIES

CASES

Alan's of Atlanta, Inc. v. Minolta Corp.,
903 F.2d 1414 (11th Cir. 1990) 9,19

Automatic Canteen Co. v. FTC,
346 U.S. 61 (1953) 8, 9, 14, 15

Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325 (7th Cir. 1986) 9

Best Brands Beverage, Inc. v. Falstaff Brewing Corp.,
842 F.2d 578 (2d Cir. 1987) 9, 19

Black Gold, Ltd. v. Rockwool Industries, Inc.,
729 F.2d 676 (10th Cir.), *cert. denied*,
469 U.S. 854 (1984) 10

Boise Cascade Corp. v. FTC, 837 F.2d 1127
(D.C. Cir. 1988) 4, 9, 10, 11, 19

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) ..... *passim*

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,
429 U.S. 477 (1977) 12, 17

Coastal Fuels v. Caribbean Petroleum Corp.,
79 F.3d 182 (1st Cir.), *cert. denied*,
117 S. Ct. 294 (1996) 10, 19

Corn Products Refining Co. v. FTC,
324 U.S. 726 (1945) 7

Estate of Cowart v. Nicklos Drilling Co.,
505 U.S. 469 (1992) 17

FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960) 8, 13

FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968) 8

FTC v. Morton Salt Co.,
334 U.S. 37 (1948) 4, 5, 7, 12, 13

Foremost Dairies, Inc. v. FTC, 348 F.2d 674
(5th Cir.), *cert. denied*, 382 U.S. 959 (1965) 9

Foremost Pro Color, Inc. v. Eastman Kodak Co.,
703 F.2d 534 (9th Cir. 1983), *cert. denied*,
465 U.S. 1038 (1984) 5, 10

Garcia v. United States, 469 U.S. 70 (1984) 17

Great Atlantic & Pacific Tea Co. v. FTC,
440 U.S. 69 (1979) 8, 13, 14, 15

H.L. Hayden Co. v. Siemens Medical Systems, Inc.,
879 F.2d 1005 (2d Cir. 1989) 9, 19

Hubbard v. United States, 514 U.S. 695 (1995) 15

Interstate Cigar Co. v. Sterling Drug, Inc.,
655 F.2d 29 (2d Cir. 1981) 9, 19

J.F. Feeser, Inc. v. Service-a-Portion, Inc.,
909 F.2d 1524 (3d Cir. 1990),
cert. denied, 499 U.S. 921 (1991) 5, 10, 19

J. Truett Payne Co. v. Chrysler Motors Corp.,
451 U.S. 557 (1981) 17

Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988) 16

Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525 (1st Cir. 1989) 10, 19

Montclair v. Ramsdell, 107 U.S. 147 (1883) 16

Perkins v. Standard Oil Co., 395 U.S. 642 (1969) 8

Perrin v. United States, 444 U.S. 37 (1979) 15

Philbrook v. Glodgett, 421 U.S. 707 (1975) 17

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 11

Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415 (8th Cir. 1986) 9

Richards v. United States, 369 U.S. 1 (1962) 17

Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381 (8th Cir. 1987) 10

Rubin v. United States, 449 U.S. 424 (1981) 16

Russello v. United States, 464 U.S. 16 (1983) 15, 17

Sorenson v. Secretary of the Treasury, 475 U.S. 851 (1986) 18

Standard Oil Co. v. FTC, 340 U.S. 231 (1951) 7

Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990) 5

United States v. Naftalin, 441 U.S. 768 (1979) 17

United States v. United States Gypsum Co.,
438 U.S. 422 (1978) 13, 14, 15

United States Department of Treasury v. Fabe,
508 U.S. 491 (1993) 16

STATUTES

Clayton Act § 2(a) as amended by the
Robinson-Patman Act, 15 U.S.C. § 13(a) ..... *passim*

Clayton Act § 4, 15 U.S.C. § 15 17

RULES

Supreme Court Rule 37.6 1

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BRIEF AMICUS CURIAE FOR THE AMERICAN PETROLEUM INSTITUTE SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE

The American Petroleum Institute (API), a non-profit District of Columbia corporation, is a national trade association.[1] More than 300 companies are members and represent various facets of the petroleum industry: exploration, production, transportation,

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[1] Pursuant to Supreme Court Rule 37.6, amicus API states that its counsel authored this brief in its entirety. No person or entity made a monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members and counsel.

refining and marketing. Many of API's member companies are engaged in nationwide marketing and distribution activities. Accordingly, API's members are vitally interested in the uniform and correct interpretation of federal antitrust laws. The splintered, conflicting views of the courts of appeals on the issue presented in this case hinder the decisionmaking process for marketing in the petroleum industry and other industries essential to the nation's economy. API believes that its participation will provide the Court with a broader perspective on the question presented and will help bring into focus the economic issues that underlie that antitrust question.

INTRODUCTION AND STATEMENT OF THE CASE

The courts of appeals are irreconcilably in conflict on a question of statutory construction that assuredly warrants this Court's review. At issue is whether the Robinson-Patman Act amendments to the Clayton Act preclude any inquiry into the competitive effect of alleged price discrimination. The court below held that evidence of price discrimination creates an irrebutable presumption of injury to competition. In reaching this result, the Ninth Circuit expressly disagreed with more discerning decisions of other courts of appeals that permit a defendant to establish the absence of harm to competition. The Ninth Circuit also misunderstood this Court's admonition that the Robinson-Patman Act reaches price discrimination "only to the extent it threatens to injure competition." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993).

In short, the case presents an important question concerning the extent to which the Robinson-Patman Act must co-exist with the Clayton Act, of which it is a part, and the Sherman Act, with which it shares a common purpose. The frequency with which the courts of appeals have confronted this issue with divergent results demonstrates the compelling need for a uniform, correct perception of the role of the Robinson-Patman Act within the overall context of federal antitrust legislation. As this Court has recognized, overly expansive views of the Robinson-Patman Act would have a pernicious effect on competition. For this very reason, the Court has granted certiorari in the past to avoid such deleterious economic consequences. *See infra* at 7-9. The same result should obtain here.

1. From 1987 to 1991, respondent was one of hundreds of distributors of lighting products in the highly competitive Southern California market. Pet. App. 3a; Pet. 3-4. During that period, respondent distributed petitioner's products along with those many other manufacturers. Pet. 4. After shutting the doors on its unprofitable business, respondent filed a complaint alleging discriminatory pricing practices. Specifically, respondent claimed that petitioner gave discounts to larger distributors that were not available to respondent, in violation of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). Respondent also asserted claims under state law that are not at issue in the petition for a writ of certiorari. Following a jury trial in the United States District Court for the Central District of California, respondent was awarded treble damages of $3,525,000 on its Robinson-Patman Act claim. Pet. App. 4a.

2. The United States Court of Appeals for the Ninth Circuit affirmed, rejecting all of petitioner's contentions under the federal antitrust laws. Pet. App. 1a-13a. The cornerstone of the Ninth Circuit's opinion is the holding that evidence of injury to an individual competitor creates an irrebutable presumption of injury to competition in a secondary-line Robinson-Patman Act case. *Id.* at 10a, 12a. Three aspects of the opinion are particularly pertinent to this Court's consideration of the petition for a writ of certiorari.

First, the opinion below addressed a question that this Court has not definitively resolved and on which the circuit courts are in conflict. Commencing its analysis with reference to the holding in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), that the Robinson-Patman Act permits competitive injury to be inferred from evidence of injury to an individual competitor, the Ninth Circuit turned to a question *Morton Salt* "left open," *viz.*, "whether the inference of competitive injury that arises from a showing of harm to an individual competitor in a secondary-line price discrimination case may be overcome by a showing that competition in the relevant market remains healthy." Pet. App. 4a. On that question, as the opinion below noted, "the circuits are divided." *Id.* at 4a-5a. Assessing this conflict of authority, the court below juxtaposed the irreconcilable holding of the District of Columbia Circuit in *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988), with those of the Third and Eleventh Circuits. Pet. App. 4a-8a. As the opinion below explained, the D.C. Circuit held that "the inference of competitive injury may be rebutted by a showing of no actual harm to competition because the Robinson-Patman Act must be construed in light of the pro-competitive purpose of all other antitrust

legislation." Pet. App. 5a. In contrast, the Third Circuit held that "the inference of competitive injury may not be overcome by evidence of no harm to competition because the Robinson-Patman Act was designed specifically to protect individual competitors rather than competition in general." *Id. (citing J.F. Feeser, Inc. v. Serv-a-Portion, Inc.*, 909 F.2d 1524, 1532-33 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991)). After reciting the analysis employed in the other courts of appeals, the opinion below ultimately agreed with those that have rejected the holding of the D.C. Circuit.

Second, the court perceived that its holding was contrary to the view expressed in prior Ninth Circuit cases that "the Robinson-Patman Act, like other antitrust laws, must be construed to protect competition, not individual competitors." Pet. App. 10a (*citing Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 548 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984)). Acknowledging that *Foremost Pro* supports petitioner's contention that a defendant may show that its conduct did not harm competition, the court held that *Foremost Pro* was "overruled, *sub silentio*" by *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990). For this conclusion, the court below conferred dispositive significance on the fact that when the opinion in *Hasbrouck* stated that harm to competition could be inferred from evidence of harm to an individual competitor -- precisely the holding in *Morton Salt* more than 40 years earlier -- this Court did not discuss *Foremost Pro*. Pet. App. 11a. In the Ninth Circuit's view, this Court's reliance on its own prior decisions somehow "undermin[ed] the holding of *Foremost Pro*." *Id.* On the basis of this reasoning, the court below held that it was "no longer bound by the reasoning of *Foremost Pro*." *Id.*

Third, the Ninth Circuit accorded no weight to this Court's post-*Hasbrouck* statement that "'the Robinson-Patman Act condemns price discrimination only to the extent it threatens to injure competition.'" Pet. App. 12a (*quoting Brooke Group*, 509 U.S. at 220). In the Ninth Circuit's view, the statutory construction in *Brooke Group* applies only to primary-line cases (*i.e.*, competition with the seller) and has no place in secondary-line cases. Pet. App. 12a. Without any basis in the Act's language, the court below held that the meaning of the statutory word "injury" differs from case to case depending on the particular plaintiffs.

REASONS FOR GRANTING THE PETITION

This case is an ideal candidate for this Court's review of an important, frequently recurring question of federal law on which the courts of appeals disagree. By creating an irrebutable presumption of injury to competition, the decision below has transformed a prima facie showing of price differential into a per se offense subject to treble damages. By its clear terms, the decision below proscribes conduct that in fact promotes competitive marketing activities. Aside from the chilling effect this holding would have on competition within the Ninth Circuit (and other regions where courts have reached similar conclusions), it poses an acute dilemma for manufacturers whose products are distributed nationwide. Decisionmakers in the petroleum industry (and many others) face the prospect of devising national marketing plans and pricing structures under legal standards that vary from circuit to circuit. Real indeed is the prospect that companies will forgo more aggressive competitive measures in order to guard against potential liability.

In addition to the intensely practical economic factors that favor this Court's review, this case warrants certiorari in order to correct fundamental errors in statutory construction that plague the decision below. By judicial fiat, the court of appeals has revised the statute to eliminate the element of injury to competition in a broad category of cases. That result is contrary to the language Congress enacted, contrary to the unmistakable mission of the antitrust laws to boost competition, and contrary to this Court's guidance in cases construing the same statutory provisions. Accordingly, this Court should exercise its certiorari jurisdiction and reverse.

1. Since the enactment of the Robinson-Patman Act amendments to the Clayton Act, this Court has been alert to resolving circuit conflicts and assuring correct, uniform interpretations of this important antitrust legislation. In *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 730 (1945), the Court observed that it granted certiorari to address the standards for proving the requisite effect on competition under § 2(a) "because the questions involved are of importance in the administration of the Clayton Act in view of the widespread use of basing point price systems." In *FTC v. Morton Salt Co.*, 334 U.S. 37, 40 (1948), which dealt with precisely the same statutory provision at issue here, the Court granted certiorari "[s]ince questions of importance in the construction and administration of the Act were presented. . . ." *See Standard Oil Co. v. FTC*, 340 U.S. 231, 234 (1951) ("case presents an important issue under the Robinson-Patman Act which has not been settled by this Court").

Cognizant of the immense impact the federal antitrust laws have on the nation's economy, the Court

has been particularly vigilant to correct erroneous interpretations of the Robinson-Patman Act that would adversely affect competition. For example, in *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953), the Court explained that the FTC's enforcement views "might readily extend beyond the prohibitions of the [Robinson-Patman] Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation. We therefore thought it necessary to grant certiorari." *Id.*

Similar vigilance informed the Court's grant of review in *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 541 (1960), to resolve fundamental definition issues under § 2(a) "because a conflict had developed among the Courts of Appeals on a question of importance in the administration of the statute." Even in cases where circuit conflicts did not exist, certiorari has been granted "to determine whether the Court of Appeals . . . had correctly construed the Robinson-Patman Act," *Perkins v. Standard Oil Co.*, 395 U.S. 642, 644 (1969), "because the case presents important questions concerning the scope of a key provision of the Robinson-Patman Act," *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 343 (1968), and "[b]ecause the judgment of the Court of Appeals raises important questions of federal law [under § 2(a)]," *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 75 (1979) (*"A&P"*).

The present case fits comfortably within these parameters. The circuits are in conflict on an important provision of § 2(a). The Ninth Circuit's woodenly incorrect statutory interpretation will impede procompetitive pricing activities, thus threatening a regime of "price uniformity and rigidity in open conflict with the purposes of other antitrust

legislation." *Automatic Canteen*, 346 U.S. at 63. For the same reasons that have warranted review of crucial Robinson-Patman issues over the last six decades, the petition for a writ of certiorari should be granted.

2. The conflict that exists among the courts of appeals on the injury to competition element of § 2(a) is inexorable and irreconcilable. As the Eleventh Circuit perceived more than seven years ago, "[a] controversy has raged (and continues to rage) over the meaning of the word 'competition' as used in the so-called 'competitive injury' phrase of section 2(a)." *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1418 n.6 (11th Cir. 1990) (citing inconsistent decisions of the District of Columbia, Fifth, Seventh, and Eighth Circuits).[2] Since then, the conflict has intensified.[3] The

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[2] Among the cases cited by the Eleventh Circuit are: *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988) (harm to competition is pivotal); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 678 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965) (§ 2(a) protects injury to competition as well as injury to competitors); *Ball Mem'l Hosp. Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986); *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986) (Robinson-Patman Act refers to competition in general, not competitors).

[3] In fact, the divergence of views among the circuit courts was even more pronounced prior to 1990 than the Eleventh Circuit perceived. *See, e.g., Interstate Cigar Co. v. Sterling Drug, Inc.*, 655 F.2d 29, 31 (2d Cir. 1981) (showing that challenged discount "would tend to lessen competition substantially or to create a monopoly . . . is an essential condition precedent to establishing" a § 2(a) claim"); *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 584 (2d Cir. 1987) (plaintiff in § 2(a) case "also must prove the likelihood of competitive injury resulting from the alleged discrimination"); *H.L. Hayden Co. v. Siemens Med. Sys., Inc.* 879 F.2d 1005, 1021 n.12 (2d Cir. 1989) (§ 2(a) "requires not only proof of price discrimination, but a potential impact substantially to

Third Circuit held in *J.F. Feeser, Inc. v. Serv-a-Portion, Inc.*, 909 F.2d 1524, 1535 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991), that "evidence of injury to a competitor may satisfy the component of competitive injury necessary to show a violation of the Robinson-Patman Act." In explaining its holding, the Third Circuit observed that, unlike the Sherman Act which protects competition, the Robinson-Patman Act "protect[s] 'those who compete . . . not just the overall competitive practice.'" *Id. (quoting Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 529 (1st Cir. 1989)).[4]

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lessen competition or create a monopoly"); *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 387 n.3 (8th Cir. 1987) ("it is settled that the Robinson-Patman Act guards against injury to competition, not injury to individual competitors"); *Foremost Pro Color, Inc. v. Eastman Kodak Co.* 703 F.2d 534, 548 (9th Cir. 1983) ("neither section 2(a) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition"), *cert. denied*, 465 U.S. 1038 (1984); *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 680 (10th Cir.) ("to establish a violation of [§ 2(a), plaintiff] must show that the price differential in this case had the requisite potential to substantially affect competition"), *cert. denied*, 469 U.S. 854 (1984).

The multiplicity of views in the courts of appeals reflects the fact that similar analytical questions arise in § 2(a) cases under the rubrics of antitrust standing, antitrust injury, and antitrust damages. Although the contexts may differ, the core issue remains the same, *viz.*, whether the Robinson-Patman Act may impose liability without regard to impact on competition. That question is squarely presented in this case.

[4] More recently, the First Circuit cited with approval the D.C. Circuit's holding in *Boise Cascade*. *See Coastal Fuels v. Caribbean Petroleum Corp.*, 79 F.3d 182 (1st Cir.), *cert. denied*, 117 S. Ct. 294 (1996).

The decision below in this case draws extensively on the analysis in *Feeser* and expressly rejects the flatly incompatible holding of the D.C. Circuit in *Boise Cascade*. *See* Pet. App. 6a-10a. As the Ninth Circuit's decision clearly depicts, there is no common ground between those courts of appeals that will scrutinize the evidence in a § 2(a) case to discern the effect, if any, on competition and those that will not. The Ninth Circuit has emphatically joined the circuit courts that end all such inquiry once evidence of price discrimination has been offered. The conflict that the opinion below discusses at length weighs strongly in favor of certiorari.

3. Review is also warranted because the Ninth Circuit's opinion is contrary to the guidance this Court has provided in Robinson-Patman Act cases.

Jumping into the "competition/competitor" debate, the Ninth Circuit failed to perceive the true nature of the controversy. The opinion below proceeds from the faulty premise that injury to competition and injury to a competitor are mutually-exclusive, antithetical concepts. This erroneous dichotomy is neither a necessary nor even a useful framework for analysis of price discrimination claims. At its core, the Ninth Circuit's basic misconception is that, unlike the Sherman Act and the Clayton Act -- which protect competition and not individual competitors -- the Robinson-Patman amendments to the Clayton Act protect only individual competitors and not competition.

The fundamental objective of federal antitrust legislation is to maximize consumer welfare. *See Brooke Group*, 509 U.S. at 220; *Reiter v. Sonotone Corp.*, 442 U.S.

330, 343 (1979). Consistent with that objective, the cases uniformly recognize that vigorous competition will benefit some participants in the market more than others; indeed, vigorous competition will even benefit some market participants at the expense of others. Those results are both inevitable and wholly unremarkable. Equally as important for present purposes, those results of effective competition are healthy and desirable. Accordingly, it is "inimical to the purposes of [the antitrust] laws," to award damages to a market entrant injured by the process of competition. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

To be sure, as the legislative history set forth in the petition relates (Pet. 10-14), the Robinson-Patman Act amendments to the Clayton Act reflect additional solicitude for certain individual competitors in particular circumstances. But it is an overreaction, unwarranted by either the language or the legislative intent of the Robinson-Patman Act, to say that the protections afforded certain competitors must come at the expense of the very competitive process the antitrust laws are designed to promote. That extreme conclusion, exemplified by the opinion below, would transform the Robinson-Patman amendments into bullets aimed at the heart of the antitrust laws. As the more penetrating opinions of this Court and other courts of appeals confirm, however, the Robinson-Patman Act did not excise all consideration of competitive effect.

In the seminal *Morton Salt* decision, this Court observed that the FTC had received voluminous evidence on the precise issue of injury to competition. 334 U.S. at 50. On that record, the Commission's

findings of the requisite injury to competition "were adequately supported by evidence." *Id.* at 51. Although commenting that the Commission had received more evidence on this issue than the statute requires, this Court plainly did not suggest any rationale for precluding or ignoring such evidence altogether.

Subsequent decisions confirm that the correct reading of *Morton Salt* preserves the relevance of evidence relating to competitive effect. In *FTC v. Anheuser-Busch*, 363 U.S. at 540-550, the FTC found competitive injury in a § 2(a) case and there is not a hint in this Court's opinion suggesting that the Commission went astray in addressing that issue. Quite the contrary. The Court commented on "the statutory provisions regarding injury to competition" and in the course of that discussion expressly relied on *Morton Salt*. 363 U.S. at 550 & n.17. Similarly, in *United States v. United States Gypsum Co.*, 438 U.S. 422, 450 (1978)(*"Gypsum"*), this Court reiterated that § 2(a) "embodies a general prohibition of price discrimination between buyers ***when an injury to competition is the consequence"*** (emphasis added). *See also A&P*, 440 U.S. at 79 (§ 2(a) depends upon competitive injury).

In its most recent relevant analysis of this provision, the Court once again confirmed the requirement of injury to competition that is expressly recited in the statutory language and is a pillar of all federal antitrust legislation. Construing precisely the same portion of § 2(a) in *Brooke Group*, this Court concluded that "Congress did not intend to outlaw price differences that result from or further the forces of competition." 509 U.S. at 220. This Court's plain directive *(id.)* is fully applicable here:

> the statute as a practical matter could not, and does not, ban all price differences charged to "different purchasers of commodities of like grade and quality." Instead the statute contains a number of important limitations . . . . By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition.

These unambiguous teachings should have been dispositive in the present case. Instead, the court of appeals set off in a different direction, failed to comprehend the primacy of competitive effect in antitrust jurisprudence, and erected a standard that would penalize even procompetitive marketing activities.

4. The decision below also departs from this Court's guidance in an additional important respect. For at least 45 years, this Court has instructed that the Robinson-Patman Act "'should be construed consistently with broader policies of the antitrust laws.'" *Brooke Group*, 509 U.S. at 220 (*quoting A&P*, 440 U.S. at 80 n.13). *See Gypsum*, 438 U.S. at 458 (same); *Automatic Canteen*, 346 U.S. at 63, 74 (same). To be sure, there are points of "potential tension between the rationales underlying the Sherman and Robinson-Patman Acts." *Gypsum*, 438 U.S. at 450. But, the Robinson-Patman Act is not, as the Ninth Circuit concluded, invariably at war with the Sherman Act and the Clayton Act (of which it is a part). "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically curtail it . . . ." *Id.* (internal quotation omitted). Consistent with that premise, this Court has been attentive to "effect a partial

accommodation" between "the rationales underlying the Sherman and Robinson-Patman Acts" *(id.)* and to avoid interpretations that would "'give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.'" *A&P*, 440 U.S. at 80 *(quoting Automatic Canteen*, 346 U.S. at 63).

The decision below collides with these directives. By precluding any consideration of the procompetitive effect of a defendant's pricing activities, the Ninth Circuit has contrived an abyss between the Robinson-Patman Act and other antitrust laws and has forbidden any bridge to span that gap. So clear a departure from this Court's prior cases strongly favors certiorari.

5. Underlying the Ninth Circuit's misinterpretation of the Robinson-Patman Act is a series of errors in statutory construction. Contrary to settled principles and to this Court's express guidance, the decision below does not give the words of the statute their ordinary meaning, does not give full effect to all words of the statute, and does not confer the same meaning upon the same word in different places in the statute. Through these errors in construction, the Ninth Circuit reached a result that thwarts the overriding purpose of the antitrust laws to promote competition.

"In determining the scope of a statute, we look first to its language." *Russello v. United States*, 464 U.S. 16, 20 (1983) (internal quotations omitted). *See Hubbard v. United States*, 514 U.S. 695, 703-04 (1995). Giving the words enacted by Congress "their ordinary . . . common meaning" *(Perrin v. United States*, 444 U.S. 37, 42 (1979)), it is clear that the requisite effect on competition must remain a relevant issue in a § 2(a)

case. The words of the pertinent portion of § 2(a) are instructive (15 U.S.C. § 13(a)):

> It shall be unlawful for any person . . . to discriminate in price between different purchasers . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . .

Under the decision below, once a plaintiff shows the existence of a price differential, that showing necessarily and irrevocably establishes injury to competition. But, that interpretation essentially reads out of the statute the words "where the effect of such discrimination may be substantially to lessen competition." *Id.* On a fundamental level, therefore, the Ninth Circuit's view contravenes the settled principle that a statute must be construed to give effect to all its parts. *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 504 n.6 (1993) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute") (*quoting Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) ("we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law"). For the same reason, the decision below also contravenes the requirement that individual words and phrases in a statute must be read in the context of the whole act. *See Rubin v. United States*, 449 U.S. 424,

431(1981); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Richards v. United States*, 369 U.S. 1, 11 (1962).

Even if it were permissible to ignore the statutory language that expressly refers to effect on competition, the holding of the Ninth Circuit would still be incorrect. By its terms, § 2(a) reaches only conduct that may "injure, destroy, or prevent competition with any person . . ." 15 U.S.C. § 13(a). Using ordinary rules of grammar and statutory construction, the word "competition" cannot be disregarded. Necessarily, the entire phrase requires that the only relevant injury is injury to ***competition***. In the view of the Ninth Circuit, however, that critical word is mere surplusage: any injury -- by which the court means any price discrimination -- will suffice. But, "[t]he short answer is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979); *Garcia v. United States*, 469 U.S. 70, 79 (1984) (same); *Russello*, 464 U.S. at 23 (same).

Further buttressing the correct reading of § 2(a) as embracing competitive effect, is Congress's use of the word "injury." There is no mistaking the meaning of that word in the Clayton Act. As this Court has held with respect to § 4 of the Clayton Act, 15 U.S.C. § 15, injury means "***antitrust*** injury, which is to say injury of the type the antitrust laws were intended to prevent . . ." *Brunswick*, 429 U.S. at 489 (emphasis in original). *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). The word injury cannot have one meaning in § 4 and a different meaning in § 2(a) of the same statute. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (rejecting interpretation "contrary to the basic canon of statutory construction that identical terms within an Act bear the same meaning");

Sorenson v. Secretary of Treasury, 475 U.S. 851, 860-61 (1986) (same).

Consistent with the correct view of the statutory language, this Court has held that "injury" in § 2(a) means injury to competition. *Brooke Group* leaves no doubt on that score. 509 U.S. at 220 (§2(a) reaches price discrimination "only to the extent it threatens to injure competition"). Contrary to this Court's clear pronouncement, the Ninth Circuit mistakenly confined *Brooke Group* to primary-line cases only. Under the decision below, Congress's use of the word "injury" has one meaning in a primary-line case and an entirely different meaning in a secondary-line case. No principle of statutory construction supports the Ninth Circuit's faulty conclusion. Moreover, nothing in the language or spirit of the antitrust laws justifies a holding that inhibits or penalizes procompetitive conduct. Because the Ninth Circuit reached a result that is contrary to Congress's stated objective, review by this Court is needed to restore a correct and uniform interpretation nationwide.

6. The issue presented in this case is not a mere academic curiosity; it has enormous practical ramifications. As a consequence of the decision below, competition will be impeded.[5]

The dilemma facing those involved in marketing and distribution is unavoidable. In the Third, Ninth and Eleventh Circuits, even price differentials that

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[5] The deleterious economic implications of the views expressed in the Ninth Circuit opinion are addressed at length in the commentaries cited in the petition. Pet. 21-23.

promote competition are vulnerable to a claim for treble damages. In other regions of the country, a manufacturer will be permitted to defend the same pricing decision by showing that it has not harmed competition. Accordingly, corporate marketing officials and their counselors face a patchwork quilt of conflicting views. By way of illustration, consider the plight of manufacturers that distribute products on the East Coast. Traveling from north to south, these manufacturers would find that the recent pronouncements and holdings of the circuit courts leave it unclear whether any showing of competitive effect will be permitted in Maine, New Hampshire, Massachusetts, and Rhode Island *(compare Coastal Fuels with Monahan's Marine)*, but require consideration of effect on competition in Connecticut, Vermont and New York *(Hayden, Best Brands, Interstate Cigar)*, preclude just such consideration in Pennsylvania, New Jersey and Delaware *(Feeser)*, require consideration of effect on competition in the District of Columbia *(Boise Cascade)*, and preclude such consideration in Georgia, Alabama and Florida *(Alan's of Atlanta)*. *See supra* at 9-10 and nn.2-4. Manufacturers face the same puzzlement as their products move westward across the country and cases decided by the Fifth, Seventh, Eighth, Ninth and Tenth Circuits are taken into account. *See id.*

The dilemma is especially acute for manufacturers that sell to large nationwide accounts. In those circumstances, manufacturers ordinarily will not know whether their products will be distributed to locations where the draconian rule of the decision below governs. There will be inexorable pressure to forgo more competitive pricing strategies in favor of the highly restrictive regime mandated by an irrebutable

presumption of injury to competition. If firms that distribute products nationwide pull their competitive punches to accommodate the decision below, the overarching goals of the antitrust laws will be thwarted. This Court should therefore grant review to preclude that undesirable result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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